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Supreme Court, U.S.
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No. 00-966

IN THE

SUPREME COURT OF THE UNITED STATES

SAJID L. SYED,

Petitioner,

vs.

HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan ; and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,

Respondents.

Petition for a writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF IN OPPOSITION

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COUNTER-COUNTERSTATEMENT OF THE CASE

Contrary to the Respondents' statement on page 1 of their Brief in Opposition ("Br. in Opp."), Petitioner ("Syed") is also seeking review of the Third Circuit's opinion on Syed's Claims under ERISA § 502(c) and ERISA § 503. This is evident from Questions 3-6, and Reasons III-VI for granting the writ. Syed requests the Court that his pleadings be held to less stringent standards. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). No matter, how skillfully Respondents have twisted the facts in this case, it should be evident to the Court that the federal courts have been defrauded by Respondents in order to deny Syed his claims under ERISA § 502(c) and § 503. Syed submits that "fraud on the court" should be a "compelling reason" needed for review by this Court. The public interest requires that the judgment of district court should be vacated. *Standard Industries, Inc. v. Tigrett Industries, Inc.* , 397 U.S. 586 (1970). Syed includes an appendix ("App.") with this Reply to demonstrate that misrepresentations have been made by Respondents in their "Brief In Opposition." Syed requests that 19 De. C. § 3315 on page 9 of his Petition be replaced by 18 Del. C. § 3315 .

Throughout his pleadings to both lower courts, Syed pleaded that the plan administrator only provided him with portfolio which was also used in *Ramsey v. Hercules Inc. et.al.*, 77 F.3d 199 (7th Cir. 1996). See selected portions of Syed's Opening and Reply Brief to Third Circuit stating "On March 22, 1995, the plan administrator provided a summary plan description in the form of a Hercules Benefits Booklet copy (Pl. App. A29)." (App. at 40a; 36a-37a). Also see App. at 33a;41a; 44a; 45a; 48a; and 58a. After receiving portfolio in response to his written request for a plan document, Syed spoke with Mr. Donahue who affirmed that the portfolio was the only available plan document. (App. at 50a, paragraph 12). Syed refers the Court to selected pages of the Plan Administrator's Brief (a public record) filed with the Seventh Circuit in *Ramsey,supra*, on May 15, 1995. (App.

at 62a-65a). Respondents pleaded that portfolio was the plan document (App. at 64a), and quoted all 3 paragraphs of the definition of total disability found in portfolio. (App. 14a-19a , at 16a). Syed urges the Court to note the following:

App. at 15a refers to portfolio as "this summary"; App. at 17a refers to portfolio as "this policy" and also advises that a 3 year statute of limitations is applicable to file a legal action; App. at 18a refers to portfolio as "this summary" twice; App. at 19a indicates John Hancock Mutual Life Insurance Company and Policy Number 26701-GTC. Provident Life and Accident Insurance Company ("Provident") has not been indicated as the claims fiduciary in violation of ERISA statutes. Nowhere in this portfolio, Policy No. M-462-LTD has been mentioned as reported by Hercules Incorporated on Schedule A for 1992, Form 5500, (a public record), to be in effect as of July 1, 1991. (App. at 75a).

Additionally, Syed refers the Court to plaintiff's contentions, witness and exhibit list from *Ramsey, supra,* (a public record) filed on July 1, 1994, in the United States District Court, Southern District of Indiana, Terre Haute Division. (App. at 66a-68a). Although, the Proof of Summary Plan Description for Hercules Incorporated ("SPD"), (Selected portions at App. 20a-24a), was included on *Ramsey's* Exhibit List (App. at 68a), it was not used as the plan document because it was not executed until October 30, 1995. See the administrative services agreement signed between Provident and Hercules Inc. on October 30, 1995. (App. at 25a-30a). Syed refers the Court to item no. 5 at App. 24a to note that this SPD refers to Policy No. M-462-LTD-ASO which was not executed until October 30, 1995 and can not be given any probative value to determine Syed's eligibility as of April 1, 1992. There are material differences between portfolio, SPD, and insurance policy contrary to Respondents assertion (Br. in Opp. at 2). Third Circuit erroneously did not analyze the insurance policy and compared SPD with LTD which is a revised copy of

SPD. See Pet. at 13a. Syed refers the Court to his argument in section I.E. at pages 7-9 of this reply.

Syed's pleadings in both lower courts demonstrate that Syed's counsel referred to portfolio as "SPD" because the portfolio indicates that it is a "summary". See App. at 15a and 18a. Since the SPD was available to counsel through discovery, he simply made a mistake of attaching a copy of SPD instead of portfolio, which he tried to correct. See Pet. at 32a, n5. Not only did the district court not allow this correction, but struck out Syed's reply brief causing him prejudice. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41 (1957).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW WHETHER THE THIRD CIRCUIT PROPERLY DETERMINED THE INTENT OF DELAWARE LEGISLATURE.

Syed is seeking review of the Third Circuit's decision on all issues decided contrary to Respondents assertion. (Br. in Opp. at 4). The decision of Third Circuit merits the attention of this Honorable Court because the courts below have failed to determine the intent of the Delaware legislature in choosing § 8111 as the proper statute of limitations. This Court has recently dealt with the clearly expressed intent of the Florida legislature in *Bush v. Gore*, 121 S.Ct. 525, 533,538,539 (2000). Syed submits to this Court that 18 Del. C. § 3315 (App. at 76a) clearly intended to apply a 3-year statute of limitations for insurance policies offered to employees through their employers. Syed also refers the Court to 18 Del. C. § 2702 (App. at 76a) which clearly states that an insurance policy is a written contract. In Delaware, an overwhelming majority of health insurance policies are

offered by the employers to their employees. It makes no sense to apply one year statute of limitations to every claim arising out of employment benefits when the statutory language of 18 Del. C. § 3315 must be included in the policies pursuant to legislature's intent. Is it the intent of Delaware legislature to defraud all employees in Delaware? Syed submits 'No'. There is no doubt that health insurance policy is a fringe benefit, and according to the legislature's intent, a three year statute of limitations is applicable. Same is the case with the group disability insurance policies. Syed's policy and plan both followed the intent of legislature and advised him that he had three years to file a legal action pursuant to § 3315. In *Rich v. Zeneca*, 845 F.Supp. 162, 166 (D.Del. 1994), the court stated "These cases suggest that 10 Del. C. § 8111 and its one year statute of limitations for wage, salary, and benefit claims should not be read as being so comprehensive as to bar all claims arising out of the employer-employee relationship. ..."

Syed suggests that the Third Circuit is also seeking this Court's help by stating "We are inclined to agree with the dissent that the one year limitations period of § 8111 is not optimal, and we also believe that a uniform, national statute of limitations for claims such as Syed's would be beneficial. ..." (Pet. at 11a-12a)

A. The Third Circuit's Decision To Apply The Appropriate Delaware Statute Of Limitations To Syed's Claim Was Incorrect, And Created Conflict Among The Circuits.

As discussed previously, the Third Circuit's decision is contrary to the intent of Delaware legislature. No court is permitted to rewrite the law. The Ninth Circuit has held that the California limitations statute applicable to actions on disability policies applies to ERISA claims for disability benefits. *See Williams v. UNUM Life Ins. Co. of America*, 113 F.3d 1108, 1111 (9th Cir. 1997). In *Blaske v. UNUM Life Ins. Co. of America*, 131 F.3d 763 (8th Cir. 1997), the Eight Circuit

held that policy provision stating that actions could not be maintained after three years, governed insured's action under ERISA. The Third Circuit found support for its decision in *Adamson v. Armco, Inc.*, 44 F.3d 650, 652-53 (8th Cir. 1995), (Pet. at 9a), that support is flawed in light of the Eight Circuit's decision in *Blaske,supra*, where The Eight Circuit chose policy limitations period over the statutory period in *Adamson*. In *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 875 (7th Cir. 1997), the Seventh Circuit held that policy limitations if reasonable are enforceable in suits under ERISA, regardless of state law.

Delaware statute applicable to insurance policies allows a contractual period of three years and Syed's ERISA policy contractual period of three years is reasonable. See 18 Del. C. § 3315 (App. at 76a). Syed's policy does not include a disclaimer advising him that a shorter statute of limitations may be applicable. In *UNUM Life Ins. Co. of America v. Ward*, 119 S.Ct. 1380, 1388 (1999), this Court concluded that "Outside the notice prejudice context, the burden of justifying a departure from a contract's written terms generally rests with the party seeking the departure."

B. The Third Circuit Erred In Selecting 10 Del. C. § 8111 As The Most Analogous Delaware Statute For A Claim Under ERISA § 502(a)(1)(B).

Syed refers the Court to his reply in previous section I. and I.A. In addition, Syed submits to this Court that § 8111 does not mention word "contract" or "contractual" in it. According to 18 Del. C. § 2702, the insurance policy is a written contract (App. at 76a) which is based on a statute and a promise. Syed submits that § 8106 is a better choice and represents the clear intent of the Delaware legislature.

Syed submits to the Court that *Mitchell v. E.I. duPont de Nemours & Co.*, 310 A.2d 641 (Del. Supr. 1973), relied upon by the Third Circuit is distinguishable in many ways from Syed's claim. First, *Mitchell* was a disability wage plan which is a short term disability plan and replaced 100% of

wages during first 6 months of disability. Syed's disability benefits are based on 66 2/3% of his wages and cover a long term disability. A short term disability plan does not qualify as an ERISA Plan. *See DiFederico v. Rolm Co.*, 201 F.3d 200, 203 (3rd Cir. 2000). Second, *Mitchell's* plan did not advise her that she had three years to file her legal action. Third, *Mitchell* had to work one year to qualify for wage replacement benefits unlike in Syed's case whose long term disability benefits were promised to him as of the first day on the job. See App. at 4a.

C. Federal Courts Have Been Defrauded By Respondents.

Syed respectfully refers the Court to his counter-counterstatement at pages 1-3 contrary to Respondents statement that Syed did not assert that portfolio was the Plan Document (Br. in Opp. at 12). In addition, Syed refers the Court to paragraphs 15-21 of his Petition.

Respondents are continuing their fraudulent scheme on this Honorable Court as well by not explaining why the portfolio submitted to the Seventh Circuit until 1995 (App. at 64a; Pet. at 61a-62a) was suddenly not the plan document as of July 1, 1990 (Pet. at 59a). Respondents have failed to explain this legal question because there is "no legal explanation". Both lower courts have been defrauded by Respondents. Respondents chose to represent to the Seventh Circuit that portfolio was the plan document and must live with it unless Syed can show that the Insurance Policy (App. at 1a-13a) was the legal document and was concealed from him until March 25, 1997.

Respondents have failed to explain to this Court and both lower courts how an SPD (App. at 20a-24a), indicating Policy No. M-462-LTD-ASO (App. at 24a, No. 5) which was not executed until October 1995 (App. at 30a) can be used to determine Syed's eligibility under the policy as of April 1, 1992. Syed urges the Court to notice that Respondents advised IRS that Policy No. M-462-LTD was the policy

effective July 1, 1990. (App. at 3a and 75a). Syed submits to the Court that SPD indicating Policy No. M-462-LTD-ASO can not be backdated. *See Confer v. Custom Engineering Co.*, 952 F.2d 41,43 (3rd Cir. 1991). In any event, the plan at the time of termination governs Syed's claims. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 (3rd Cir. 1990). It was a legal error for both lower courts to allow Respondents to use an SPD which was not executed until October 30, 1995.

D. Granting The Summary Judgment Was A Legal Error On Syed's ERISA § 502(c) AND ERISA § 503 Claims.

District court granted Respondents summary judgment ignoring Syed's factual disputes about the correct plan document. Throughout his answer brief (App. at 42a-48a), Syed disputed the material facts. Syed refers the Court to App. at 43a; 44a; 45a; 46a; and 48a. Syed also refers the Court to the definition of total disability that was quoted to him in the termination letter. (App. at 69a-72a). The definition provided did not belong in either insurance policy (App. at 3a) or portfolio (App. at 16a). A twisted definition was provided in violation of ERISA § 503. Delaware Supreme Court does not allow an insurance company to twist or destroy the words under the guise of construing them, if the language of policy is clear and unambiguous. See *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. Supr. 1982). Syed respectfully submits that summary judgment on Syed's § 502(c) and § 503 claims was improperly granted and must be reversed.

E. The Third Circuit Erroneously Ignored The Insurance Policy In Conflict With This Court's Opinion.

The Third Circuit has entered a decision in conflict with the decision of this Court and should be reviewed pursuant to Sup. Ct. R. 10 (a) & (c). In *UNUM Life Ins. Co. of America v. Ward*, 119 S.Ct. 1380 (1999), this Court's decision is based upon the language of an ERISA insurance policy for

disability benefits. Both lower courts have erroneously ignored Syed's contention that insurance policy (App. at 1a-13a), under which he was paid benefits for two years, was the plan document. Both courts based their decisions upon a one-line fraudulent statement in Douglas Hill's affidavit that insurance policy was not the plan document and was not issued until 1994 (Pet. at 59a). A cursory review of this policy (App. 1a-13a), indicates the intent of Respondents to provide Syed with long term disability benefits under ERISA effective July 1, 1990. There is not even a doubt that Syed was paid benefits under this policy. (See App. at 69a; 75a; 50a). In *Pegram v. Herdrich,* 120 S.Ct. 2143,2145,2151 (2000), this Court concluded:

> The common understanding of "plan" is a scheme decided upon in advance. Here the scheme comprises a set of rules defining a beneficiary's rights and providing for their enforcement. **When employers contract with an HMO to provide benefits to employees subject to ERISA, their agreement may, as here, provide elements of a plan by setting out the rules under which beneficiaries will be entitled to care.**

Pegram at 2145. Syed submits to this Court that the document entitled "Your long term disability benefit" (App. at 1a-13a) was the plan document effective July 1, 1990 but was concealed from Syed in violation of 29 U.S.C. § 1024(b) and several other federal statutes indicated in the Petition, (Pet. at 17-22). Syed refers the Court to the following pages of his ERISA governed insurance policy in the appendix:

App. at 2a states "This booklet constitutes the Employee's certificate of coverage while covered under the Plan."; App. at 3a provides the definition of total disability having no two tiers and indicates the effective date as July 1, 1990; App. at 4a advises a participant how to enroll in the plan. If this policy was only an insurance contract between Hercules Inc. and Provident, there would be no need to advise a participant "how to enroll in the plan"; App. at 8a

lists partial disability provision which benefits have been denied arbitrarily and capriciously. See Respondents' own IME report at 73a); App. at 6a lists a minimum benefit available under the policy; App. at 9a advises about the applicable statute of limitations being three years and also lists ERISA disclosure statement; App. at 10a indicates Policy No. M-462-LTD.

Syed respectfully submits that there are material differences between the insurance policy, SPD, and portfolio. Definition of total disability is completely different in insurance policy (App. at 3a) and is fatal to Respondents' defense. Respondents' chief reason to deny Syed disability benefits is that Respondents assert that the definition of disability changed after first 24 months. Respondents concede that Syed's condition did not change after first 24 months. See Defendant's responses to plaintiff's first set of interrogatories (App. at 61a). Syed respectfully submits to the Court that both the lower courts ignored Syed's contentions that Respondents did not have any valid reason to discontinue his disability benefits, total disability or partial disability.

F. Syed Has Been Denied "Due Process".

Syed respectfully refers the Court to his argument and counter-counterstatement in this reply. It is evident that both the lower courts ignored Syed's contention that the insurance policy was the plan document contrary to this Court's opinion in *Pegram, supra.* Both lower courts also ignored Syed's contention that he was not provided with SPD in response for his written request. Both lower courts ignored Syed's contention that portfolio which was submitted to the Seventh Circuit as the plan document until 1995, was also provided to Syed as the plan document until the opening briefs were filed in this case on October 26, 1998. Most of Syed's material contentions have been erroneously ignored denying him due process of law.

II. SYED MAY RAISE ISSUES FOR THE FIRST TIME

Respondents argument that Syed should not be permitted to raise issues for the first time on appeal (Br. in Opp. at 6) is without merit. This Court has jurisdiction to consider an issue not raised below. See *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980); *Youakim v. Miller*, 425 U.S. 231 (1976).

III. STATUTE OF LIMITATIONS IS TOLLED WHEN MATERIAL FACTS ARE CONCEALED.

Syed submits to the Court that Respondents are barred from using the statute of limitation defense if the Court determines that insurance policy was the plan document effective July 1, 1990 but was concealed from Syed until March 25, 1997. Respondents also concealed the SPD from Syed as the plan document until their opening brief on October 26, 1998. Syed's action was filed on February 6, 1996 and should be considered timely filed under the tolling principles. *See Urie v. Thompson, 337 U.S. 163, 170 (1949); Taylor v. Freeland & Kronz, 503 U.S. 638, 647 (1992).*

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A
(Selected Portions for Illustration Purpose)

YOUR
LONG TERM
DISABILITY BENEFIT

Hercules Incorporated

(LTD logo)

CERTIFICATE

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

Chattanooga, Tennessee
(herein called the Provident)

Certifies that it has issued Group Policy No. M-462-LTD
(herein called the Plan) to
HERCULES INCORPORATED
(herein called the Policyholder)

The Plan provides the benefits described on the following pages for certain Employees covered under the Plan. This booklet summarizes the principal provisions of the Plan. The Plan alone constitutes the entire contract between the Provident and the Policyholder.

Employees become covered under the Plan as provided on a following page. This booklet constitutes the Employee's certificate of coverage while covered under the Plan.

The benefits and provisions described on the following pages are subject in all respects to the terms and conditions of the Plan.

s/ illegible
President and
Chief Executive Officer
Provident Life and Accident
insurance Company

SECTION I - DEFINITIONS

Long Term Disability Benefits

Total Disability and Totally Disabled - You will be termed Totally Disabled due to injury or illness only if you are not able to work at any job for gain or profit for which you are fitted by education, training, or experience.

SECTION II - ELIGIBILITY, EFFECTIVE DATE AND TERMINATION OF COVERAGE

Long Term Disability Benefits

Effective Date of Plan

The effective date of the Plan is July 1, 1990

When Coverage Starts

You are in the eligible class if you:

(1) are a regular full-time, non-represented employee of the policyholder who works at a location where coverage is in force, or a regular full-time employee of the Policyholder covered by a collective bargaining agreement providing coverage under this plan;
(2) routinely work at least 20 hours per week; and
(3) are residing in the U.S. or Canada.

If you are employed by Hercules Aerospace Display Systems, Inc., Hercules Defense Electronics Systems, Inc.,

Simmonds Ind., Inc., (DBA Cooperative Ind., Inc.), Simmonds Precision Engine Systems, Inc., Simmonds Precision Motion Controls, Inc., or Simmonds Precision Products, Inc., you will also be considered as an Employee of the Policyholder under the Plan.

If you are in the eligible class, you become eligible for coverage under Option A immediately.

You will be covered on the first day of Active Work, provided you have completed a full day of Active Work on that date.

If you do not meet this requirement, coverage will become effective on the date you return to Active Work.

Coverage under Option B is available the first day of the month following the day you complete 3 months of Active Work in the eligible class.

Enrolling in the Plan

Option A is provided automatically, you do not need to do anything to enroll. About one month before you are eligible for Option B, you will receive an enrollment card. Indicate on this card if you want the additional coverage and return it to your benefits coordinator. You must make a choice within 10 days following the date you become eligible.

If you decline coverage under Option B and later decide to enroll, you will be required to provide proof of good health on forms satisfactory to the Provident. Coverage will then become effective on the date proof of good health is approved by the Provident provided you are Actively at Work.

You may elect to change your coverage during the annual reenrollment or due to a change in family status. Proof of good health will be required if you elect to enroll in Option B if you had earlier declined coverage.

SECTION III - SCHEDULE OF BENEFITS
Long Term Disability Benefits

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(5) any amount for which you or any of your dependants are eligible because of your disability or retirement under the Federal Social Security Act, Railroad Retirement Act, or any plan or act of like intent of a foreign nation, as follows:
(a) during any period for which you are eligible for disability benefits, regardless of whether application for such benefits has been made; and
(b) during any period you are eligible for Retirement Benefits, but only if you have applied for and are actually receiving such benefits.

During the period of time between the date you apply for Social Security benefits and the date such benefits are actually granted or denied, you must elect one of the following options:
(i) you may have your Basic Benefit Amount reduced by an estimate of your expected Social Security benefits; or
(ii) you may elect to have no reduction made until the date Social Security benefits are actually granted.

If you elect option (i), your Basic Benefit Amount will be adjusted on the date Social Security benefits are actually granted or denied.

If you elect option (ii), you must sign an agreement to promise to repay the Provident any overpayment caused by

Social Security benefits being paid. This overpayment must be made to the Provident on the date Social Security benefits are actually paid.

In the event benefits are denied under the Federal Social Security Act, Railroad Retirement Act, or any plan or act of like intent of a foreign nation, you must file a request for reconsideration. If denied again, you must request a hearing before an Administrative Law Judge unless waived in writing by the Provident.

If you:
(a) do not elect one of the above options;
(b) do not file a request for reconsideration; or
(c) do not request a hearing;

as required, your Basic Benefit Amount will be adjusted as if you had elected option (i) above.

Minimum Benef.. - Your Basic Benefit Amount will not be reduced to less than the greater of:
(1) 10% of the Basic Benefit Amount or;
(2) $100.00.

SECTION IV - COVERAGE PROVISIONS
Long Term Disability Benefits

Total Disability Benefit Provision

Monthly benefits will be paid to you during a Period of Total Disability which begins:
(1) while you are covered under the Plan; and
(2) while the Plan is in effect.

The monthly benefit is determined from the Schedule of Benefits.

You must be under the regular treatment of a Physician to receive benefits.

Benefits will start on the day after you have been Totally Disabled for the Elimination Period and will end on the sooner of:

(1) the date of death;
(2) the date Total Disability ceases;
(3) the date you fail to provide satisfactory proof of your disability; or
(4) the end of the period of time next following the Elimination Period as determined from the **Maximum Benefit Period** below.

Attained Age On Date Total Disability Begins	Maximum Benefit Period*
Under Age 62	To Age 65
Age 62 but Under Age 63	42 months
Age 63 but Under Age 64	36 months
Age 64 but Under Age 65	30 months
Age 65 but Under Age 66	24 months
Age 66 but Under Age 67	21 months
Age 67but Under Age 68	18 months
Age 68 but Under Age 69	15 months
Age 69 or Over	12 months

* The first five years of claim liability is self insured by Hercules Incorporated.

Partial Disability Benefit Provision

If you are Partially Disabled within 31 days of a period during which you received Total Disability Benefits, the Provident will pay a Monthly Benefit as shown below. The Partial Disability must result from the injury or illness for which you received Total Disability benefits.

Monthly Benefit - If you are Partially Disabled in your job or any job, the following formula will be used:

(A divided by B) X C

A = Your Indexed Pre-Disability Pay minus your earnings while you are disabled.
B = Your Indexed Pre-Disability Pay.
C = Your Net Benefit.

The benefit will never be less than the Minimum Benefit in the Plan.

Benefits will end on the sooner of:
(1) the date of death;
(2) the date Partial Disability ceases;
(3) the date you fail to provide satisfactory proof of your disability; or
(4) the end of the period of time next following the Elimination Period as determined from the **Maximum Benefit Period** on the preceding page.

SECTION V - CLAIM PROVISIONS
Long Term Disability Benefits

Legal Actions

No action will be brought to recover under the Plan until 60 days after proof of disability has been given. No action can be brought after 3 years from the date such written proof is required.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

The following information, together with the information contained herein, comprise the Summary Plan Description under the Employee Retirement Income Security Act of 1974 only for the benefits described herein:

(1) The name of the Plan is Group Long Term Disability Plan for Employees of Hercules Incorporated.

(2) The name, address and telephone number of the:

(a) Plan Sponsor is: Hercules Incorporated, Hercules Plaza, Wilmington, DE 19894, 302-594-5000.

(b) Plan Administrator is: Same as plan sponsor.

(c) Agent for Service of Legal Process is: Plan Administrator, Hercules Incorporated, Hercules Plaza, Wilmington, DE 19894, 302-594-5000.

(d) The name and address of the Claims Fiduciary is: Provident Life and Accident Insurance Company, One Fountain Square, Chattanooga, Tennessee 37402

(3) The Plan identification Number is 51-0023450-702, and the Plan's records are maintained on a Plan year basis ending June 30th each year.

(4) The cost of the Plan for Option A is borne by the Plan Sponsor. For Option B, you will contribute toward the cost of covering your Base Monthly Pay in excess of $2,400.

(5) Benefits are provided in accordance with the provisions of Group Policy No. M-462-LTD issued by Provident Life and Accident insurance Company, Chattanooga, Tennessee 37402.

(6) Claim Procedures:

Claims for benefits under the Plan are to be submitted to the Provident as provided herein. Payment of claims under the Plan will be made by the Provident. If an employee's claim for benefits under the Plan is denied, the employee will receive a written explanation giving detailed reasons for the denial, specific reference to policy provisions on which the denial is based, a description of any additional material or information necessary for the employee to perfect the claim and an explanation of why such material or information is necessary, as well as an explanation of the claim appeal procedure.

If the employee is not satisfied, or does not agree with the reasons for the denial of the claim, the employee may appeal the decision to the Claims Fiduciary named above. That Company is designated in the plan as the

Claims Fiduciary with final discretionary authority to determine eligibility for benefits or to construe the terms of the plan for claims purposes only.

This appeal must be in writing, and can be made by the employee or a duly authorized representative. It must set out the reasons for the appeal and the employee's dissatisfaction or disagreement. Any evidence or documentation to support the employee's position should be submitted with the employee's written appeal. Upon written request, the employee may review pertinent documents that pertain to the employee's claim and its denial.
The employee's appeal must be made within 60 days of the date of receipt of the letter denying the claim.

The Claims Fiduciary will promptly review the claim and appeal. It will advise the employee of its decision with specific references to pertinent policy provisions on which the decision is based. This written decision will be sent to the employee no later than 60 days after its receipt of the employee's written appeal, unless special circumstances require an extension of time for processing the appeal, or obtaining more information or conducting an investigation of the facts. In no event will the written decision be sent late than 120 days after the employee's written appeal is received.

(7) As a participant in the Plan you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all Plan participants will be entitled to:

(i) examine, without charge, at the Plan Administrator's office and at other locations, such as work sites, all Plan documents, including insurance contracts, and copies of all documents filed by the Plan

with the U.S. Department of Labor, such as detailed Annual Reports and Plan Descriptions;

(ii) obtain copies of all Plan documents and other Plan information upon written request to the Plan Administrator. The Administrator may make a reasonable charge for the copies; and

(iii) receive a summary of the Plan's annual financial report. The Plan Administrator is required by law to furnish each participant with a copy of this summary annual report.

In addition to creating rights for Plan participants, ERISA imposes duties upon persons who are responsible for the operation of the employee benefit plan.

The people who operate your plan, called "fiduciaries" of the Plan, have a duty to do so prudently and in the interest of you and other Plan participants and beneficiaries.

No one, including your employer, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a welfare benefit or exercising your rights under ERISA.

Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the Plan Administrator and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the Plan Administrator to provide the materials and pay you up to $100.00 a day until you receive the materials. This does not apply if the materials were not sent because of reasons beyond the control of the Plan Administrator.

If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court. If it should happen that Plan fiduciaries misuse the Plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court.

The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees; for example, if it finds your claim is frivolous.

If you have any questions about your Plan, you should contact the Plan Administrator. If you have any questions about this statement or about your rights under ERISA, you should contact the nearest Area Office of the U.S. Labor Management Services Administration, Department of Labor.

(8) The right is reserved in the Plan for the Plan Sponsor to terminate, suspend, withdraw, amend or modify the Plan, covering any active Employee or current or future retiree, in whole or in part at any time. Any such change or termination in benefits (a) will be based solely on the decision of the Plan Sponsor and (b) may apply to all active Employees, current retirees or future retirees, as either separate groups or as one group. This is subject to the applicable provisions of the Plan.

APPENDIX B
(Selected Portions for Illustration Purpose)

YOUR
HERCULES
BENEFITS
PORTFOLIO

INCOME PROTECTION

Short Term Disability
Long Term Disability

Foreword

In the case of bargaining units represented by a union, not all of the explanations of this summary may apply. The provisions of the collective bargaining agreement will govern applicability of the specific provisions of the Plan.

Definition of Total Disability

You are considered totally disabled if you are not able to perform your job during the waiting period (normally six months) and during the first 24 months of benefit payments. You must not be able to engage in any work for wage or profit during this time, unless approved under the rehabilitative program.

After receiving 24 monthly payments, you are considered totally disabled for as long as you are prevented from performing any employment for wage or profit for which you are reasonably qualified by training, education, or experience.

A doctor assigned by the Company's Claims Administrator has the right to examine you from time to time to determine if you remain totally disabled.

End of Disability

Your disability is considered to have ended when the earliest of the following occurs:

- You are no longer totally disabled.
- You begin work in a job for which you are reasonably qualified by training, education, or experience.
- You fail to furnish proof of your continuous total disability or refuse to be examined by a doctor assigned by the Company's Claims Administrator.
- You cease to be treated by a licensed physician.

Statute of Limitations

Proof of loss not submitted within 90 days from the time such proof is otherwise required, except in the case of absence of legal capacity, may invalidate a claim for benefits. No action at law shall be brought to recover on **this policy** after the expiration of **3 years** after the time written proof of loss is required to be furnished.

Claims for benefits must be filed within twelve months of when an employee ceases active work to be considered.

Employee Retirement Income Security Act

The Employee Retirement Income Security Act of 1974 (ERISA) entitles you to certain rights as a participant in this plan. These rights entitle you to:

· Automatically receive a summary of the financial status of this plan (Summary Annual Report) following the end of each Plan Year.

· Review without charge or purchase Plan documents mentioned in **this summary**. If you fail to receive requested material within 30 days, you may file suit in Federal court, unless the materials were not sent because of matters beyond the control of the Plan Administrator.

· Request the Department of Labor to remove a fiduciary who violates an ERISA standard, and/or require the fiduciary to make good any losses the fiduciary caused to the Plan.

(Fiduciaries are responsible for the operation of a Plan and must act solely in the interest of plan participants, and must exercise prudence in the performance of their duties.)

· File suit in a Federal or state court if you are improperly denied a Plan benefit in full or in part after you have exhausted your rights under the Denied Claims Appeal Procedure mentioned in **this summary.**

· Make a written request to the Plan Administrator for a statement describing your benefit entitlement. There is no charge for supplying this information once a year.

. Be free of discrimination if you attempt to obtain a benefit or exercise your rights under ERISA.

If you have any questions about your rights under ERISA, please contact your benefits coordinator or the nearest area office of the U.S. Labor/Management Service Administration, Department of Labor.

Plan Administration Information

Plan Administration - This Plan is administered through a group contract with The John Hancock Mutual Life Insurance Company (Policy Number 26701-GTC).

Plan Administrator and Plan Sponsor
Hercules Incorporated , Hercules Plaza
Wilmington, Delaware 19894, Phone: (302) 594-5000

Named Fiduciary for This Plan
Finance Committee, Hercules Incorporated
P.O. Box 168 , Wilmington, Delaware 19894

Agent for Legal Process
Hercules Incorporated, Hercules Plaza
Wilmington, Delaware 19894

Employer Identification Number - The EIN assigned to Hercules by the IRS is 51-0023450.

Plan Identification Number - The PIN assigned to this Plan is 702.

Plan Year - For the purpose of maintaining fiscal records, the Plan Year ends each December 31.

Plan Funds - This Plan is funded through Company contributions for basic coverage and employe contributions for optional coverage.

Plan Continuation - It is the intention that the Plan be continued indefinitely; however, Hercules reserves the right to modify, suspend, or end this Plan at any time.

APPENDIX C
(Selected Portions for Illustration Purpose)

PROOF OF

SUMMARY PLAN DESCRIPTION

for

HERCULES INCORPORATED

DISABILITY

INTRODUCTION

Hercules has two income protection plans should you become disabled due to illness or injury. One covers short term absences. Coverage under this plan begins the day you begin regular employment and it costs you nothing. The other plan replaces part of your income when you have been disabled for six (6) months or longer. Long term coverage comes with two options. The basic coverage, **Option A**, costs you nothing; additional coverage, Option **B**, is available at a small cost to you. You are eligible for Option A immediately upon hire. A three month waiting period applies to Option B.

You are a member of the eligible class if you are a full-time, non-represented employee of the Company and work at a location where coverage is in force, or you are covered by a collective bargaining agreement providing benefits under these plans.

Throughout this brochure, you will find references to Hercules and/or "Company". Their meanings are synonymous.

Minimum Benefit - Your Basic Benefit Amount will not be reduced to less than the greater of:
(1) 10% of your Basic Benefit Amount; or
(2) $100.00

PARTIAL DISABILITY BENEFIT

If you are totally disabled and receiving a benefit (beyond the end of the 6 month elimination period) and subsequently you are able to perform your job on a limited basis or do any job and earn less than 80% of your indexed pre-disability earnings, you are then considered partially disabled. To be eligible, you must satisfy the 6 month elimination period while totally disabled; benefits will be paid as long as you remain Partially Disabled, up to the Maximum Benefit Period outlined on page 5.

Monthly Benefit - If you are Partially Disabled in your job or any job, the following formula will be used:

(A divided by B) multiplied by C

A= Your Indexed Pre-Disability Pay minus your earnings while you are disabled.
B = Your Indexed Pre-Disability Pay.
C = Your Net Benefit while Totally Disabled.

The benefit will never be less than the Minimum Benefit in the Plan.

For Example:

Indexed Pre-Disability Pay = $1,000.00 Earnings while disabled = $500.00
Divided by Indexed Pre-Disability Pay $1,000.00

Multiplied by the Net benefit while Totally Disabled - $667.00 (66 2/3% x $1000)

$$\frac{[\$1000 - \$500]}{\$1000} \times \$667 = \$334 \text{ Partial Monthly Benefit}$$

Indexed Pre-Disability Pay means your Base Monthly Pay in effect just prior to the date you become Totally Disabled increased by 5% per year.

Legal Actions

No action will be brought to recover under the Plan until 60 days after proof of disability has been given. No action can be brought after 3 years from the date such written proof is required.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

The following information, together with the information contained herein, comprise the Summary Plan Description under the Employee Retirement Income Security Act of 1974 only for the benefits described herein:

(1) The name of the Plan is Hercules Incorporated Income Protection Plan.

(2) The name, address and telephone number of the:

(a) Plan Sponsor is: Hercules Incorporated, Hercules Plaza, Wilmington. Delaware 19894, 302/594-5000.

(b) Plan Administrator is: same as (2) (a).

(c) Agent for Service of Legal Process is: Hercules Incorporated, Hercules Plaza, Wilmington, Delaware 19894, 302/594-5000.

(d) The name and address of the Claims Fiduciary is: Provident Life and Accident Insurance Company, One Fountain Square, Chattanooga, Tennessee 37402.

(3) The Plan Identification Number is 51-0023450-702, and the Plan's records are maintained on a Plan year basis ending June 30 each year.

(4) Employees contribute at a fixed rate per month toward the cost of the Plan through payroll deductions. The remainder of the cost of the Plan is borne by the Plan Sponsor.

(5) Benefits are provided in accordance with the provisions of Group Policy No. M-462-LTD-ASO issued by Provident Life and Accident Insurance Company, Chattanooga, Tennessee 37402.

(6) Claim Procedures:

Claims for benefits under the Plan are to be submitted to the Provident as provided herein. Payment of claims under the Plan will be made by the Provident. If an employee's claim for benefits under the Plan is denied, the employee will receive a written explanation giving detailed reasons for the denial, specific reference to policy provisions on which the denial is based, a description of any additional material or information necessary for the employee to perfect the claim and an explanation of why such material or information .....

APPENDIX D

ADMINISTRATIVE SERVICES AGREEMENT NO. M-462-LTD-ASO

This Agreement between Hercules Incorporated (hereinafter referred to as "the Employer") and the Provident Life and Accident Insurance Company (hereinafter referred to as "the Administrator") is to set forth the basis on which the Administrator agrees to provide administrative services, with respect to the Employer's program of Long Term Disability Benefits, for certain employees (hereinafter referred to as "the Benefit Program") as set forth in the Hercules Incorporated Long Term Disability Plan Summary Plan Description beginning on or after July 1, 1990, in consideration of payment by the Employer of the agreed upon fee and performance by the Employer of the functions itemized in this Agreement. Under terms of this agreement, the Employer is responsible for all claims liability incurred for the first 5 years of disability after the 6 month elimination period has been satisfied as defined in the Summary Plan Description. If disability continues beyond this period, the claims liability is transferred to the Administrator and will be administered under the terms and provisions set forth in Plan Number M-462-LTD-ASO.

I. Claims Administration

1. The Employer shall:

a. Furnish the Administrator with a detailed description of the Benefit Program.

b. Authorize Provident to serve in the official capacity as claim fiduciary, as defined under the Employee Retirement Income Security Act of 1974 (ERISA).

c. Assist the Administrator, when necessary, in determining eligibility under the benefit program.

2. The Administrator shall:

a. Based upon the Employer's instructions, prepare a write-up of the Benefit Program and any changes thereto during the continuation of the servicing of the Benefit Program.

b. Prepare copy for and print descriptive booklets for Benefit Program Participants.

c. Follow the claims administration procedures and practices desired by the Employer and consult with the Employer on any changes.

d. Provide suitable facilities, personnel, procedures, forms and instructions for the administration of claims under the Benefit Program.

e. With assistance of the Employer, when necessary, certify eligibility of participants to receive payments under the Benefit Program.

f. Determine, in accordance with the Benefit Program and claims administration procedures and practices, the qualification of claims submitted, making, such investigations as may be necessary.

g. Make payment with the Employer funds, as provided for in Section III, of amounts due with respect to claims that qualify under the Benefit Program as provided above.

h. Serve as claim fiduciary by retaining the ultimate responsibility for the final determination of eligibility and claim payments

i. Report to the Employer annually, matters of general interest with respect to the Benefit Program, e.g., problems of recurring nature, local situations, and suspected misuses of benefits.

j. Report to the Employer all non-routine claims in process.

k. Submit to the Employer a monthly accounting of payments, in sufficient detail to provide for the audit and control of funds used.

l. Provide advice on the Benefit Program revisions.

m. During the continuation of this Agreement, agree to indemnify the Employer and hold the Employer harmless against any and all loss, damage, and expense with respect to this Benefit Program, resulting from or arising out of the dishonest, fraudulent or criminal acts of the Administrator's employees, acting alone or in collusion with others.

n. Maintain Blanket Bond Coverages , if needed, and to the extent needed.

The parties to this contract agree that they shall not reveal to any third party not a party to this Agreement, any individually identifiable medical information without first receiving the proper authorization from the individual person involved, except that no such authorization shall be required where the Administrator or Employer are defending a claim or suit brought against them by the Individual person. Such proper authorization will comply with the laws of the state of residence of the individual in question.

II. Administration Fee

The Employer shall pay the Administrator a monthly administration fee during the continuation of this Agreement. Beginning July 1, 1990, the administration fee shall be $0.03 per month per $100 covered monthly payroll. This fee covers the administration of both the full ASO agreement for claims incurred prior to July 1, 1990, and the partial ASO agreement for claims incurred on or after July 1, 1990.

Increased expenses, incurred by reason of changes in the Benefit Program, will give the Administrator the right to adjust the fee on the date of such changes. The fee shall be adjusted on any date that increased or decreased expenses are incurred by reason of change in the charges imposed by any governmental or regulatory entity with the power to mandate changes to the Plan, such adjustment being limited to the amount of change. This fee is subject to change by the Administrator as of the first day of any month during the continuation of this agreement, but not more than once during any period of 12 consecutive months.

The Employer shall also reimburse the Administrator, in a timely manner, all reasonable expenses related to the services of outside vendors. Such services will only be obtained after consultation with and consent of the Employer.

In addition, the cost of the printing service listed in Section I 2.b of this Agreement shall be borne directly by the Employer.

III. Benefit Program Account

The Employer shall provide funds to be used to make Benefit Program Payments to participants as funds are needed to cover such payments. It shall be the Employer's responsibility to provide funds sufficient to cover checks validly issued.

IV. Liability and Indemnity

The Administrator does not insure nor underwrite the Liability of the Employer under the Benefit Program. The Employer retains the ultimate responsibility for claims made under the Benefit Program and all expenses incident to the Benefit Program except as specifically assumed in this Agreement by the Administrator. The Employer agrees to indemnify the Administrator and hold the Administrator harmless against all claims including but not limited to, claims for premium taxes or other taxes, punitive damages, other reasonable expenses and any and all loss or damage incurred by the Administrator in connection with lawsuits, or other proceedings, brought against the Administrator to recover benefits under the Benefit Program, unless such actions arise out of gross negligence, fraud or malicious conduct of the Administrator. The administrator retains the responsibility for court costs and attorney fees incurred in the defense of litigation arising from claim decisions made by the administrator as claim fiduciary. The employer retains the responsibility for any costs incident to the participation by employees of the employer as witnesses, either at trial or at deposition.

V. Termination and Revision

This Agreement may be terminated effective upon the first day of any month following thirty (30) days written notice of termination by either party to the other, or upon notice by

the Administrator in the event the Benefit Program Account contains a balance which is insufficient to meet the Benefit Program and the Employer obligations. This Agreement may be revised by written agreement signed by both parties, except as otherwise herein provided.

FOR THE EMPLOYER:	FOR THE ADMINISTRATOR:
By: s/illegible	By: s/illegible
Title: Director Employee Benefits, Hercules	Title: Vice President, Group Underwriting Corpotate Risk Management
Date: 10/30/95	Date: 10/20/95

APPENDIX E
(Selected Portions for Illustration Purpose)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5472
SAJID L. SYED
Appellant,
v.
HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan, and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,
Appellees.

PETITION FOR PANEL REHEARING AND REHEARING IN BANC OF APPELLANT SAJID L. SYED
OF OPINION OF COURT DATED MAY 30, 2000 FROM THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Appellant Sajid L. Syed, through counsel, respectfully suggests this matter is appropriate for Panel Rehearing and for Rehearing In Banc as a result of opinion of Court entered May 30, 2000, Affirming Order Denying Motion for Reargument and Clarification by the District Court of the District of Delaware dated July 15, 1999. This Petition is being presented on the following bases, reasons and legal positions contained here and flows from the concern that the Court's May 30, 2000 Opinion is contrary to previously issued case law of the Third Circuit as indicated by the cases set forth below and requires review to secure or maintain uniformity of decisions of the Third Circuit, indicated by IOP 9.3.1 Criteria for Rehearing in Banc:

Legal Analysis and Authorities; Plan document versus summary plan description (SPD); exhaustion of administrative remedies; contractual nature of an ERISA plan; misleading statements in a plan document; continuing violation for failure to pay each installment of monthly benefit from a plan; statutory violations of ERISA; fiduciary breach claims and tax-qualified plan claims:

1. Based on a prior decision of the Third Circuit Court of Appeals, Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1318 (3rd Cir.1991) this Court defined "plan" as other than a summary plan description. Therefore, the basic determination of both the Delaware District Court and this Court as to treating any one of three "plan" offerings of Hercules as the same (whether it be an SPD, brochure, or a legal plan document) ignores any factual difference between these presentations as to the legal effect of each. Gridley is concerned with allowing a doctrine that would help a claimant proceed to establish a claim under ERISA based on the deception of the plan administrator in providing a truthful disclosure. Gridley relies on "no damage resulting from that representation." Id., at 1319. **Because Syed could read any one of three offerings (SPD, brochure or Plan Doucment) to find that he had three years to file an action, he was deceived, and therefore "damaged" because his case has been not filed within "one year."**

2. Harte v. Bethlehem Steel Corp., 204 F.3d 442, 447, 449 (3rd Cir. 2000) is a recognition that a fiduciary breach occurs when disclosure violations have resulted from failure to keep a claimant fully informed to the extent that he or she is not provided misleading information on which retirement decisions are to be based. **The provision of SPD, plan document or brochure, which items were repeatly referred to in the May 30, 2000 opinion all contain a three-year limitations period for filing a legal action.** Syed took these

communications as indicating that he had ample time to pursue his exhaustion of remedies process before the plan administrator (in this case Hercules) would object to his filing a court action. At this point, the Plan Administrator (Hercules) is asserting a statute of limitations period that does not exist in any of the plan(s) and is thus committing the very fiduciary breach Harte sought to protect against. Harte was also cited by Smith v. Contini, 205 F.3d 597, 605 (3rd Cir.2000), to affirm that a plan administrator fiduciary (Hercules) acting consistently with a plan nevertheless may breach its fiduciary duty. Delaware claimants need to know if the fiduciary breach thus spelled out is a violation of ERISA that also needs to be asserted within a one-year period. . . .

8. Confer v. Custom Engineering Co., 952 F.2d 41 (3rd Cir.1991) concludes that backdating a health plan is impermissible under ERISA and only a formal written document accomplishes an amendment to the plan. Here, in Syed's case the opinion of May 30, 2000 used SPD and LTD (plan) interchangeably to factually justify the non-disclosure claim denial of the District Court. **It should be clear to the Court from Syed's submissions via Appendix presentation that the initial material provided him showed that the "claims administrator" was John Hancock Insurance Company. The SPD entitled "Benefits Portfolio" provided to Syed as the plan document is enclosed with Pat Donahue's affidavit (Appellant Appendix, A71-A86).** Pat Donahue affirmed this fact on 3/24/95 to Syed. See Syed's affidavit at A88. The definition of total disability found in this SPD at A81 is almost identical to the definition found in M462-ltd (A36-A55) at A39. By allowing a "plan" dated 1995 to become effective July, 1990 as discussed in the May 30, 2000 Opinion of this Court, is would appear that the Court is sanctioning the backdating activity apparent here, contrary to the action disproved in Confer.

9. While it is not a decision of this Honorable Court, Syed directs the Court to Herzberger v. Standard Ins. Co., 205 F.3d 327, 330 (7th Cir.2000) for a clear indication that an ERISA plan is a contract and requires a special determination as to the discretion to be implied. As Syed's factual submissions show, Appellees at no time asserted that there was any discretion explicitly or impliedly bestowed on the plan administrator. Such discretion is part of every ERISA plan interpretation because it generates the standard of review to analyze the decision of the plan administrator. **The contractual nature of Hercules Disability Plan was at no time disputed by the Appellees herein, and the provisions -of M-462-LTD plan document were applied to Syed by Provident as directed by the provisions of the contract.** Judicial review of this contract involves trust law considerations as required by Firestone Tire & Rubber Co., v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). These trust law implications do not flow from an employment contract. See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 115 S.Ct. 1223, 1230, 131 L.Ed.2d 94 (1995) (ERISA has an elaborate scheme built around reliance on the face of written plan documents to enable beneficiaries to learn their rights). This Court has discussed the broad trust and fiduciary duties inherent in ERISA plans in In Re Unisys Corp. Retiree Medical Benefits ERISA, 957 F.Supp. 628 (E.D.Pa. 1997) and several cases cited therein. . .

Respectfully submitted,

s/illegible
John M. Stull, Esq. (#568)
1220 North Market Street, Suite 510
P. O. Box 1947
Wilmington, DE 19899
Ph. 302) 654-0399
Attorney for Plaintiff, Sajid L. Syed

Dated: June 13, 2000

APPENDIX F
(Selected Portions for Illustration Purpose)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5472
SAJID L. SYED
Appellant,
v.
HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan, and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
C . A . No. 96-62 (JJF)

APPELLANT'S REPLY BRIEF ON APPEAL

John M. Stull, Esq. (Del. Bar #568)
1220 North Market Street, Ste #510
P. O. Box 1947
Wilmington, DE 19899
Ph. 302) 654-0399
Attorney for Plaintiff
Sajid L. Syed

Dated: November 17, 1999

STATEMENT OF ISSUES PRESENTED FOR REVIEW

II. UNDER ERISA SECTION 502(c) [29 U.S.C. Section 1132(c)] A WRITTEN REQUEST TO THE PLAN ADMINISTRATOR FOR A COPY OF THE PLAN DOCUMENT REQUIRES THE PLAN ADMINISTRATOR TO PROVIDE THE PLAN DOCUMENT TO CLAIMANT WITHIN 30 DAYS AND BURDEN IS ON PLAN ADMINISTRATOR TO SHOW A PROPER RESPONSE TO AVOID SANCTIONS.

Appellees address this issue and do not contest its presentation. Appellant therefore views the issue of whether a valid and proper plan document applicable to a benefits claim under an ERISA plan is properly before the Court.

STATEMENT OF FACTS

I. APPLICABLE STATUTE OF LIMITATIONS AS TO PLAN AND BENEFITS

. . . Provisions of "plan documents" submitted by Hercules as the plan in effect as of March, 1992 also provide that **no legal action shall be brought after three years from the time proof of loss is to be furnished (to John Hancock).** (Pl. App. A83).

II. LACK OF DISCLOSURE OF PLAN DOCUMENTS

Appellant Syed initially requested in writing on February 24, 1995 (Pl. App. A28), that he be provided a copy of the Plan Document in effect as of the date of March, 1992 (Pl.App. A28; C36). On March 22, 1995, the plan administrator **provided a summary plan description in the**

form of a Hercules Benefits Booklet copy (Pl. App. A29). As part of discovery, Syed's counsel eventually obtained a copy of a "plan document" from Defendants counsel (Pl. App. 30-A55), which appeared to have been in existence at the time of Syed's on-the-job injury and which appeared to be a "plan document" rather than a summary plan description (Pl. App. A40). Conflict exists as to date of execution. See Pl. App. A32 (October 4, 1991 with signature by Patrick Donahue) and A33 showing execution on January 21, 1994 (by Provident of M462-LTD Group Policy effective July 1, 1990.) . . .

STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellees' claim that Ramsey v. Hercules Incorporated, 77 F.3d 199, 204-206 (7th Cir. 1996) is unrelated because "Ramsey involved a different plaintiff and different claims" (Answer Br., p. 9). **It is not disputed that the Seventh Circuit in Ramsey was analyzing the very same Hercules Income Protection Plan now under review in this court and found no grant of discretion in the exact language at issue in the instant case. . . .**

s/illegible
John M. Stull, Esq. (Del. Bar #568)
1220 North Market Street, Ste #510
P. O. Box 1947
Wilmington, DE 19899
Ph. 302) 654-0399
Attorney for Plaintiff
Sajid L. Syed

Dated: November 17, 1999

APPENDIX G
(Selected Portions for Illustration Purpose)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5472
SAJID L. SYED
Appellant,
v.
HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan, and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
C . A . No. 96-62 (JJF)

OPENING BRIEF ON APPEAL OF APPELLANT

John M. Stull, Esq. (Del. Bar #568)
1220 North Market Street, Ste #510
P. O. Box 1947
Wilmington, DE 19899
Ph. 302) 654-0399
Attorney for Plaintiff
Sajid L. Syed

STATEMENT OF THE CASE

This is an ERISA action in which Appellant Sajid L. Syed ("Syed") seeks continued disability benefit entitlement under Hercules Incorporated Income Protection Plan ("Plan") **based on his disability at the time of termination of his employment.** Syed filed this action in the District of Delaware as a claim for benefits under 29 U.S.C. Section 1132(a)(1)(B) from the Plan under which he was initially approved, but qualification status was revoked after 24 months by Provident Life and Accident Insurance Company ("Provident") acting as claims fiduciary.

Syed's District Court action sought an additional remedy, based on lack of disclosure of the Plan document, of sanction amounts as provided by 29 U.S.C. Section 1133 (c), because of failure by Hercules to provide the plan document pursuant to his specific written request. Nondisclosure deprived Syed of details of the Plan definition of disability, discretionary review and claims procedures. Hercules provided a Summary Plan Description in response to a specific request for a Plan document.

District Court granted Summary Judgment to Defendants using Delaware's one-year statute of limitations for wage claims instead of contract (three-year) limitation causing Syed's claim for plan benefits to be untimely. District Court denied summary judgment to both parties on the merits of Syed's disability. Summary judgment was denied to Syed's disclosure claim. This appeal followed summary judgment for Defendants.

STATEMENT OF FACTS

II. LACK OF DISCLOSURE OF PLAN DOCUMENTS

Appellant Syed initially requested in writing on February 24, 1995 (Pl. App. A28), that he be provided a copy of the Plan Document in effect as of the date of his on-the-job injury in January, 1992. **On March 22, 1995, the plan administrator provided a summary plan description in the form of a Hercules Benefits Booklet copy (Pl. App. A29).** As part of discovery, Syed's counsel eventually obtained a copy of a "plan document" from Defendants counsel (Pl. App. 30-A55), which appeared to have been in existence at the time of Syed's on-the-job injury and which appeared to be a "plan document" rather than a summary plan description. No where in this plan document is there discretionary language bestowed upon Hercules as the plan administrator to allow a deferential, arbitrary and capricious standard of review to be applied to benefits determinations of the plan administrator.

Because no Plan document was provided to Syed or his attorney until March, 1997, Syed could not show the definition of disability or lack of discretion. However, Defendants' responses to Interrogatories have supplied this fact of lack of discretion and the de novo review (Pl. App. A57-A66; A59-A60). However, District Court found as a conclusion that there was a factual basis for an arbitrary and capricious standard of review and indicated that that deferential standard of review was proper. **Syed claims an abuse of discretion in the District Court's determination on the basis of clear factual error, both as to lack of plan language and on the basis of an admission in the Interrogatories response of Defendants denying existence of such a deferential standard. . . .**

STATEMENT OF RELATED CASES AND PROCEEDINGS

The matter of Syed v. Hercules Inc., et.al. has not been before the Third Circuit Court of Appeals. A case which Appellant Syed considers related to his appeal is Ramsey v. Hercules Incorporated, 77 F.3d 199, 204-206 (7th Cir. 1996) analyzing Hercules Income Protection Plan as administered by Provident and **finding no grant of discretion in the exact language at issue in the instant case.**

There are, to Appellant Syed's knowledge, no other cases or proceedings related to this matter. . . .

CONCLUSION

For all the foregoing reasons, Appellant Sajid L. Syed requests that the Court reverse the order below entered May 28, 1999 granting Defendants summary judgment and remand to District Court for further proceedings with direction to the District Court to allow case to proceed as having been filed timely, to make clear that a de novo review applies to Plan interpretation, and for such other and further relief as the Court deems proper.

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Sajid L. Syed

Dated: October 4, 1999

APPENDIX H
(Selected Portions for Illustration purpose)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-62-JJF
SAJID L. SYED
Plaintiff
v.
HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan, and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,
Defendants.

PLAINTIFF'S ANSWER BRIEF IN RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Attorney for Plaintiff

Dated: November 27, 1998

SUMMARY OF ARGUMENT

1. Plan Administrator ("Hercules") originally provided Syed a disability benefit under Hercules' long term disability plan. Following Syed's settling his Workers' Compensation claims with Hercules (his former employer), he was advised that his long term disability benefits had been terminated. Because the long term disability plan **did not provide a "two-tier" benefits determination,** his original determination by the plan administrator fixed his entitlement to long term disability benefits unless his physical condition can be shown to have changed.

Failure to provide discretionary powers in the plan to the plan administrator by which to allow a deferential standard of review (requiring de novo review) and the superficial IME by Dr. Joson cannot support a denial of LTD benefits.

2. Defendants' claim that the within action is barred by the statute of limitations is in error since Syed's claims are based on **statute and contract entitlements** and fall under 10 Del.C Section 8106 which provides a three-year limitations period in which to pursue such claims.

3. Defendants' claim **that a correct plan document was provided is factually disputed** above and in Plaintiff's Opening Brief. There is prejudice as to Syed's ability to file his claims against the LTD Plan and Section 502(c) sanctions should be provided in the Court's discretion.

Prejudice of a more substantial nature is shown by non-existence of a two-tier, 24 month "requalification" standard in the LTD Plan that should have been provided to Plaintiff in order for his claims to be properly filed with the Plan Administrator and pursued in court. In addition, prejudice

is shown in the denial to him of a proper plan document by which to judge his workers' compensation claims.

4. By denying Syed benefits, the Plan Administrator did not meet the procedural requirements of Section 503, ERISA, [29 U.S.C. Section 1133] in that it did not detail why Syed's medical evidence is helpful, or not helpful to his disability status claim, nor did it advise Syed what he needed to show or submit to the Plan Administrator in the way of further evidence in order to obtain disability.

STATEMENT OF FACTS

I. THE PARTIES TO LITIGATION

Hercules is admittedly the plan sponsor and Plan Administrator. The "claims fiduciary" for the Plan is Provident Life and Accident Insurance Company. On February 24, 1995, Syed sent by certified mail to the plan administrator (Hercules Inc.) a written request for a "complete copy of the LTD Plan document effective as of March 4, 1992." (App. Al). **Had the proper LTD Plan document been provided as requested, Provident would have been named as a defendant in this litigation.**

Defendants' Brief at page 13 states "As a preliminary matter, Plaintiff's contention that Hercules, as Plan Administrator, denied his claim is incorrect. (Id.) Plaintiff's claim was reviewed and denied by Provident – not Hercules." Defendants are confused as to who is doing what under their own plan. Hercules as the Plan Sponsor and the Plan Administrator has the ultimate responsibility for approval or denial of a benefits claim. Calling Provident the "Claims Fiduciary" and discussing "discretion" the "Claims Fiduciary" has has nothing to do with discretion the plan document is required to provide a Plan Administrator for the plan administrator to be able to exercise, under ERISA,

what is known as discretion to make decisions and have the decisions reviewed under an arbitrary and capricious (deferential) standard of review.

Plaintiff points to Defendants' incorrect quotation at page 13. The paragraph quoted that supposedly puts discretion into the hands of the "decision-maker" (Provident) begins "It is the intent of the Plan Sponsor that" [the Claims Fiduciary . . . .] Saying that the Plan intends to bestow discretion is not the same has having the LTD Plan bestow discretion.

Hercules as Plan Administrator, in the person of **Patrick C. Donahue provided on March 22, 1995 (App. A2), a "summary plan description" for the Hercules Short Term Disability and Long Term Disability plans App. A3-A20.** By letter dated March 25, 1997 (App. A21-A22), over two years later and after the instant action was filed, attorney for Hercules, Mr. Kevin Shannon, **provided Syed's counsel a copy of plan document legal language that was not the SPD represented to be the plan as provided by Patrick Donahue on March 22, 1995. Had this plan document been provided timely, Provident would have been named.**

Compare these facts with statements in Defendants' Brief on page 14 stating that Provident was not made a party to the case. Defendants compound the confusion generated by not providing the correct plan document by stating that Hercules as a defendant "did not participate in the alleged wrongful conduct, . . ." This view can not withstand analysis due to Hercules' own admission it is the Plan Administrator, and factual analysis of the Ramsey case cited above and **discussing in detail the same plan at issue here.**

II. PLAINTIFF'S ORIGINAL DISABILITY CLAIM

Plaintiff disputes the provision cited in the LTD Plan that during the first 24 months, total disbility depends on inability to perform his job. The correct legal language plan document provided by Mr. Shannon on March 25, 1997 and labeled as "M-462-LTD" does not contain this provision. There is no reference to a period of the first 24 months in the Plan. Also, as previously stated the "LTD Plan" does not have language in its provisions that require that a disabled participant has to meet an additional, separate set of disability standards after 24 months.

Defendants also note in their Brief, page 5, Note 3, that the LTD Plan went into effect in July, 1990. However, the **ASO document did not go into effect until 1995**. The document Defendants refer to, ("M-462-LTD-ASO"), is in reality an **Administrative Services Agreement** with Provident to handle claims (see also note 6, Def. Br., page 14). Because Hercules is self-insured for the first five years of benefit payments under the long term disability plan, the ASO "plan" was set up to insure Hercules for the period subsequent to the first five years of liability under the LTD Plan. **However, the ASO "plan" is not the correct plan document.** Plaintiff also **disputes** that the administrative services agreement is the approriate written vehicle to provide discretionary review. As stated, it is Plaintiff's claim that any discretion must be in the "LTD Plan."

IV. DEFENDANTS' CLAIM THAT PLAINTIFF BREACHED AN AGREEMENT TO REIMBURSE THE PLAN FOR OVERPAYMENTS.

. . . Plaintiff can also show that Defendants' dispute as to the existence of the LTD Plan (not the ASO "plan"), is not true because **the language that is incorporated into the "reimbursement agreement" comes from the LTD Plan document which is claimed not to exist at the time the reimbursement language was agreed to by Hercules** in

November 1992. Compare plan language at A33, Pl. App., and Option B of the reimbursement agreement at A54. . . .

ARGUMENT

II. Defendants claim that this action is barred by the statute of limitations ignores the provisions of 10 Del.C. Section 8106 providing for three-year limitations period for action under contract or statute.

Simply stated, Section 8106 provides a three-year period to bring actions on a contract. The LTD Plan is a contract and no such benefits would be awarded pursuant to Syed's employment without a specific plan (contract). Also, to be noted is that the claims Syed makes for non-disclosure of plan information are based on ERISA Section 502(c) [29 U.S.C. Section 1132(c)] which was enacted to force plan administrators to make disclosures to proper written requests.

III. Defendants' failure to provide a correct document provides the basis for imposition of disclosure sanctions.

While prejudice is needed to enable the court to the degree of violation of disclosure, damages or prejudice is not required. It has been shown factually that the correct plan document was not provided within 30 days of Plaintiff's written request. According to Section 502(c), ERISA, [29 U.S.C. Section 1132(c)] the necessity for a plan administrator to provide plan documents pursuant to written request is sanctionable by an award of up to $100 per day for violations thereof. In this case it has been over two years since Syed's request was finally properly and correctly satisfied. See Smith v. Hartford Ins. Group, 6 F.3d 131, 141 (3rd Cir. 1993)

As a result , Syed was disadvantaged by not knowing that **Provident was the claims fiduciary, that there was no two-tier, 24-month redetermination of disability option available to the plan administrator to require different disability standards, and that there was a partial disability option available to a claimant.**

As further prejudice, Syed's negotiations as to his eventual award of his Workers' Compensation settlement was denied a fair opportunity for appraisal by his attorney or him. Not knowing the details of the now evident LTD Plan and its proper application, plus the eventual denial of LTD benefits prior to his W.C. settlement tricked him into believing that LTD benefits were to be in place and would take the place of any W.C. benefits. His agreeing to a $25 per week settlement for W.C. claims was evident of Hercules tactics of switching his entitlements in mid-stream.

Also at a disadvantage was his counsel in formulating the Complaint. **Relying only on an SPD provided to Syed, suit was filed only against Hercules and the Income Protection Plan and not against a specific LTD Plan or Provident.** These entities are part of the mix of review and benefit determination, and their obligations were obscured by Syed's request for a copy of the LTD Plan (M-462-LTD) not being properly responded to or addressed. . . .

Respectfully submitted,

s/illegible
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Ph. 302) 654-0399
Attorney for Plaintiff

Dated: November 27, 1998

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-62-JJF

SAJID L. SYED
Plaintiff
v.
HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan, and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,
Defendants.

AFFIDAVIT OF SAJID L. SYED

I, Sajid L. Syed, being first duly sworn upon my oath, say:

1. I am the Plaintiff in the above entitled case, have personal knowledge of all facts contained herein and am competent to testify.

2. I was employed by Hercules Incorporated on September 26, 1988 and on January 31, 1992 was employed as a Senior Chemical Operator.

3. On March 16, 1992, my treating physician, Dr. Manouchehr Amini certified that I was totally disabled to perform any kind of work as of March 6, 1992.

4. My request for short term disability benefits dated March 27, 1992 was denied on May 13, 1992 by Hercules Incorporated. This issue was finally resolved through the JP Court on November 18, 1993.

5. My initial claim for long term disability benefits dated August 3, 1992 was approved on March 4, 1993.

6. My long term disability benefits were paid under the Plan/Policy No. M-462-LTD.

7. My long term disability benefits were not paid under the plan/Policy No. M-462-LTD-ASO.

8. My physical condition has not improved and, in fact, deteriorated since March 6, 1992.

9. Prior to my physical examination of Dr. Joson on March 10, 1994, Dr. Joson commented to me that I was able to perform some type of light duty work.

10. I experienced sharp pain in my neck during Dr. Joson's examination on March 10, 1994. Dr. Joson commented by saying, "you have arthritis in your neck, you know"

11. Although, in my first appeal dated April 21, 1994, I questioned the thoroughness and partiality of Dr. Joson's independent medical evaluation, I was never given an opportunity to submit any evidence regarding my complaint.

12. After receiving Patrick C. Donahue's letter dated March 22, 1995, I spoke with Mr. Donahue on March 24, 1995 over the telephone. Mr. Donahue assured me again that the only available "plan document" effective as of March 4, 1992, was the one he enclosed with his letter dated March 22, 1995.

13. On April 15, 1993, I agreed to settle my workers' compensation claim based upon the terms and conditions of a letter dated April 15, 1993 from Hercules' attorney Anthony M. Frabizzio. This letter has never been shown to me as of this date.

14. It was my understanding and belief that my agreement to a minimized settlement of my workers' compensation claim was based upon the continuation of long term disability benefits.

15. It was my understanding and belief that my long term disability benefits were made a part of my workers' compensation settlement.

16. Since I settled my workers' compensation claim based upon payments for 300 weeks I was also lead to believe that my long term disability benefits will continue for a guaranteed period of first 300 weeks.

17. It is my belief that Hercules Incorporated in not entitled to social security offset from the benefits paid under the workers' compensation claim.

18. Since my long term disability benefits were made part of my workers' compensation claim, it is also my belief that Hercules Incorporated has already benefited by offsetting the long term disability payments from my workers' compensation benefits.

19. It is my belief that Anthony M. Frabizzio's letter dated April 19, 1993, clearly shows that my long term disability payments were made a part of my workers' compensation settlement.

20. It is my belief that Hercules Incorporated negotiated my workers' compensation claim based upon the continuation of my long term disability payments, without getting any authorization from the Plan.

21. It is my belief that Hercules Incorporated is self insured for the payments of long term disability benefits for the first 5 years of a claim.

22. It is my belief that Hercules Incorporated is self insured for the payments of workers' compensation benefits.

23. It is my belief that Provident Life and Accident Insurance Company is liable for the payments of long term disability benefits after the first 5 years of a claim.

24. Based upon above facts, it is my belief that Hercules Incorporated is not entitled to seek any reimbursement from the social security benefits in this particular matter.

25. Based upon above facts, it is my belief that Hercules Incorporated has waived its eligibility to receive any reimbursement from the social security benefits for a minimum period of first 300 weeks.

Further affiant saith not.

s/ illegible
Sajid L. Syed

Subscribed and sworn to before me, a Notary Public in and for said County and State, personally appeared Sajid L. Syed, who acknowledged the execution of the foregoing Affidavit on this 24 day of November, 1998.

s/ illegible
Notary Public (Seal)

APPENDIX J
(Selected Portions for Illustration purpose)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-62-JJF
SAJID L. SYED
Plaintiff
v.
HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan, and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,
Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Attorney for Plaintiff

Dated: October 26, 1998

SUMMARY OF ARGUMENT

2. On February 5, 1995, Syed wrote to Hercules as the Plan Administrator to request that Hercules provide a copy of the legal plan document of the Long Term Disability Plan ("LTD Plan"). The official Plan document was not provided until well into discovery, which document was provided by Defendants' counsel on March 25, 1997. As a result of the delay in disclosure, Syed's counsel did not know that the plan entity was the Long Term Disability Plan (M-462-LTD), nor that the claims administrator was Provident, and therefore did not name the LTD Plan or Provident as defendants. Plaintiff will request that the Court ass the LTD Plan to the caption, pursuant to Plaintiff's application to amend the complaint. Further, by this delay in providing the correct plan language document, Plaintiff is entitled to a per diem sanction award for failure to send a plan to an intended participant, as Syed is, pursuant to written request.

3. . . . Plaintiff Syed can show that a previous case determination of disability under this identical LTD Plan established 1) no discretion in the plan administrator to interpret terms of the LTD Plan, 2) no two-tier, 24 month, standard under the LTD Plan on which to base a denial of Syed's disability benefit by imposing such a review or to base a review of Plaintiff's physical condition such as to deny his long term disability, and 3) no requirement of physical change in claimant's condition such as to allow a reversal of the original disability determination.

STATEMENT OF FACTS

I. EXISTENCE OF A LEGAL LANGUAGE PLAN DOCUMENT

On February 24, 1995, Syed sent by certified mail to the plan administrator (Hercules Inc.) a written request for a

"complete copy of the LTD Plan document effective as of March 4, 1992." (App. A1). The Plan Administrator in the person of Patrick C. Donahue responded on March 22, 1995 (App. A2), by sending a "summary plan description" for the Hercules Short Term Disability and Long Term Disability Plans App. A3-A20. By letter dated March 25, 1997 (App. A21-22), the attorney for Hercules, Mr. Kevin Shannon, provided Syed's counsel a correct copy of the legal language plan document that was not the document represented by the "summary plan description" provided by Patrick Donahue on March 22, 1995.

This correct legal language plan document provided by Mr. Shannon on March 25, 1997 is labeled as "M-462-LTD" and is effective July 1, 1990. App. A23-A46. This is the "Plan" in effect as of March 4, 1992, which Syed requested on February 24, 1995 but did not receive until March 25, 1997. **This "Plan" does not have language in its provisions that require that a disabled participant has to meet a separate set of disability standards after 24 months.**

As defined in this Plan document, at pages 4-5, (App. A30) "Total Disability and Totally Disabled" means "You will be termed Totally Disabled due to injury or illness only if you are not able to work at any job for gain or profit for which you are fitted by education, training, or experience." There is nothing anywhere in this document that provides a different or new set of standards or definition of disability after a period of 24 months. . . .

II. SYED'S DISABILITY REVIEW

Syed appealed his disability termination on July 27, 1994 and was denied on August 10, 1994 (App. A51). He submitted further information on October 28, 1994 and on November 9, 1994 by letter (App. A52-A53) from Gail Wilhoit, was notified that his appeal was denied because he

was not totally disabled. He was also informed in this letter that his claim for partial disability benefits was denied because **"in order to be considered for partial disability you must be working at the time total disability benefits cease."** This bizarre conclusion must have meant that although Syed was totally disabled, he should go back to work so that he could get partial disability benefits. . . .

ARGUMENT

II. Plaintiff's request for a copy of the Plan Document was not correctly responded to and he entitled to an award of sanctions for violations of disclosure requirements of ERISA

It has been shown factually that the correct plan document was not provided within 30 days of Plaintiff's written request. According to Section 502(c), ERISA, [29 U.S.C. Section 1132(c)] the necessity for a plan administrator to provide plan documents pursuant to written request is sanctionable by an award of up to $100 per day for violations thereof. In this case it has been over two years since Syed's request was finally properly and correctly satisfied. See Smith v. Hartford Ins. Group, 6 F.3d 131, 141 (3rd Cir.1993).

As a result, Syed was disadvantaged by not knowing that Provident was the claims fiduciary, that there was no two-tier, 24-month redetermination of disability option available to the plan administrator to require different disability standards, and that there was a partial disability option available to a claimant.

III. LTD Plan provides no discretion to Plan Administrator to make independent discretionary determination of disability and thus allows a de novo review to a reviewing

Court to examine factual support for disability status and indication of change of disability status.

Medical reports submitted by Syed are not controverted by substantial evidence or other reports establishing that Syed has no more back and leg pains or other infirmities. Dr. Raymond Joson's evaluation report even suggests a partial disability is indicated (A104). Dr. Joson also only reviewed Syed for lumbar strain, and not complete neck and upper back pain and movement. Syed's Social Security disability award, his Workers' Compensation disability award and his continued treatment by Dr. Ufberg indicate his on-going disability which has not been controverted to show that there is any job he can do on a full-time basis that utilizes his education, training or experience. See Ladd v. ITT Corp, 1998 U.S. App. LEXIS 13357, (7th Cir., 6/22/98). See also Gunderson, supra.

De novo review by the Court is required when the plan does not provide discretion to the plan administrator. The LTD Plan at issue has been determined to lack such discretion. See Ramsey v. Hercules Inc., et.al., 77 F.3d 199, 205, 206 (7th Cir.1996) for a review of the LTD Plan and a conclusion that no discretion exists in this plan. Both the factual determinations and the plan interpretations are subject to de novo review. Ramsey, at 204. This case also cites and relies on Luby v. Teamsters Health, Welfare and Pension Trust Funds, 944 F.2d 1176, 1183 (3rd Cir.1991).

IV. Failure to provide documents pursuant to written request by a plan partcipant is required under ERISA and is subject to per diem sanctions which Plaintiff claims are due

Section 502(c), ERISA, [29 U.S.C. Section 1132(c)] is an enforcement procedure to provide participants access to information under their employee plans. Not acceding to these requests denies information to participants which they

need to be fully informed as to their rights under the plans. Clearly, in this case, Syed was denied a fair consideration of the plan and its terms as they apply to him. In addition, he was unable to sufficiently establish his entitlement to partial disability as a plan benefit, by not being fully aware of the plan terms.

Also at a disadvantage was his counsel in formulating the Complaint. Relying only on an SPD provided to Syed, suit was filed only against Hercules and the Income Protection Plan and not against a specific LTD Plan or Provident. These entities are part of the mix of review and benefit determination, and their obligations were obscured by Syed's request for a copy of the LTD Plan (M-462-LTD) not being properly responded to or addressed.

It is also clear that the Ramsey case, supra, was on-going at the same time, and Hercules and Provident and their counsel were aware of the issue of which plan (especially M-462-LTD) was a necessary document for use by Syed in his benefit claims process. See the Wilhoit March 31, 1994 letter (A48-A50) referencing M462-LTD which time was coincident with the District Court proceedings. See Affidavit of Israel J. Floyd at A74-A75, Appendix. . . .

CONCLUSION

For the above reasons, factual bases and case authority, Plaintiff Sajid L. Syed requests that this Honorable Court grant his Motion for Summary Judgment to provide continuation of disability benefits under the Defendant Plan(s), and grant further relief in the form of sanctions for non-disclosure of plan documents, and for costs and attorneys' fees as claimed in his Complaint, and to deny the Defendants' Motion for Summary Judgment as is expected to be made, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ illegible
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Attorney for Plaintiff

Dated: October 26, 1998

APPENDIX K
(Selected Portions for Illustration Purpose)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-62-JJF
SAJID L. SYED
Plaintiff
v.
HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan, and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,
Defendants.

RESPONSES AND OBJECTIONS OF DEFENDANTS HERCULES INCORPORATED AND HERCULES INCORPORATED INCOME PROTECTION PLAN TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

RESPONSES TO SPECIFIC INTERROGATORIES

5. Please state facts on which you rely to show discretion has been delegated to the Plan Administrator under the Plan to interpret terms of the plan.

RESPONSE:

Defendants object to this interrogatory on the grounds that it is vague and ambiguous. Subject to and without waiving the foregoing objection and the General objections noted above, Defendants state that they do not contend that "discretion has been delegated to the Plan Administrator under the Plan to interpret the terms of the Plan."

6. Please state facts on which you rely to show that Plaintiff's disabled condition changed after 24 months of his total disability determination under the Plan so as to allow the Plan Administrator under the Plan to find that he was not totally disabled.

RESPONSE:

Defendants object to this interrogatory on the grounds that it is vague and ambiguous. Subject to and without waiving the foregoing objection and the General Objections noted above, Defendants state that they do not, at this time, contend that Plaintiff's "condition changed after 24 months." Rather, the definition of total disability that is applied to determine eligibility for benefits after a participant has received benefits for 24 months is different from the definition applied during the first 24 months.

7. Please state facts on which you rely to show that Plaintiff's disabled condition changed after 24 months of his total disability determination under the Plan so as to allow the Plan Administrator under the Plan to find that he was not partially disabled.

RESPONSE:

Defendants object to this interrogatory on the grounds that it is vague and ambiguous. Defendants also object on the grounds that the interrogatory suggests that the Plan Administrator determines eligibility for partial disability benefits. Subject to and without waiving the foregoing objections and the General Objections noted above, see Response to Interrogatory No. 6.

POTTER ANDERSON & CORROON LLP

By: s/illegible
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Attorneys for Defendants

Dated: May 5, 1998

APPENDIX L
(Selected Portions for Illustration Purpose)
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-1574

LINDA RAMSEY ,
Plaintiff-Appellant,
v.
HERCULES INCORPORATED and PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY.
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division
Cause No : TH93 -215 - C

Hon, Larry J. McKinney, U.S. District Judge Presiding

BRIEF OF DEFENDANTS-APPELLEES HERCULES INCORPORATED AND PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

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Attorney for Defendants-Appellees

I.
APPELLEE'S JURISDICTION STATEMENT

Plaintiff-appellant's jurisdictional summary is complete and correct.

II.
STATEMENT OF THE ISSUES

The main issues presented for review by plaintiff are:

1. Whether the District Court erred in admitting and considering the affidavit of Janet Clark and attached Exhibits(R.24) in ruling on defendant's motion for summary judgment;

2. Whether the District Court erred in granting summary judgment in favor of defendants and against the plaintiff.

III.
STATEMENT OF THE FACTS

On October 1, 1975, plaintiff began her employment with Hercules Incorporated. On January 7, 1991, the day she last worked, she was employed as a slitter operator. (Exhibit A-2 to Clark affidavit, Record on Appeal Document 24 (R.24)) During all relevant times, there was provided by plaintiff's employer an income protection plan for short term disability and long term disability. (Donahue affidavit and Exhibit 1 to Donahue affidavit, Record on Appeal Document 23 (R.23)) Effective July 1, 1990, Provident Life and Accident Insurance Company began administering the Hercules long term disability process. The named fiduciary for the long term disability plan, The Finance Committee of Hercules Incorporated, appointed Provident Life and Accident Insurance Company as Claim Fiduciary. That appointment was approved by the Board of Directors of Hercules

Incorporated on September 25, 1991. (Floyd affidavit, p. 1-2, R.22) Pursuant to the short term disability benefits provision of that plan, plaintiff received her full pay for six (6) months following January 7, 1991. She received those benefits until July 7, 1991. (R.23, Ex.1 at 4; R.24, Ex.A-2) As a covered participant in the plan, plaintiff was eligible for long term disability benefits beginning July 8, 1991. (R.24 at 2) During the first two (2) years of long term disability a participant was entitled to benefits if she was not able to perform her job. **The plan, which is attached to the affidavit of Patrick C. Donahue, Director of Employee Benefits for Hercules Incorporated provides (R.23 at 8):**

> You are considered disabled if you are not able to perform your job during the waiting period (normally six months) and during the first 24 months of benefit payments. You must not be able to engage in any work for wage or profit during this time, unless approved under the rehabilitation program.
>
> After receiving 24 monthly payments you are considered totally disabled for as long as you are prevented from performing any employment for wage or profit for which you are reasonably qualified by training, education, or experience.
>
> A doctor assigned by the Company's Claims Administrator has the right to examine you from time to time to determine if you remain totally disabled. (Emphasis included in original.)

(continued ....)

CONCLUSION

The district court properly granted Summary judgment in favor of the defendants and against the plaintiff and the district court's order should be affirmed in all particulars.

Respectfully Submitted,

COX, ZWERNER, GAMBILL & SULLIVAN
511 Wabash Avenue
P.O. Box 1625
Terre Haute, IN 47808-1625

s/illegible
David W. Sullivan, 0750-84

CERTIFICATE OF SERVICE

I certify that on the 15 day of May 1995, service of two copies of the above and foregoing Brief of Defendants-Appellees was made Upon Keith L. Johnson, attorney for plaintiff, by hand delivering two copies of the same to the law office of Keith L. Johnson, 323 Ohio St. Terre Haute , IN 7807.

s/illegible
David W. Sullivan

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

LINDA RAMSEY,
Plaintiff,

Cause No. TH 93-215-C

vs

HERCULES INCORPORATED and
PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,
Defendants.

PLAINTIFF'S CONTENTIONS, WITNESS AND EXHIBIT LIST

Comes now Plaintiff, by counsel, and submits her Contentions as follows:

Plaintiff contends that on January 8, 1991, and at all times relevant hereto, Plaintiff was an employee of Hercules Incorporated at the Terre Haute, Vigo County, Indiana plant, and as such was a participant and a covered beneficiary under an Employee Retirement Income Security Plan sponsored by Hercules Incorporated, Plan Identification Number 51-0023450-702 in which Provident Life and Accident Insurance Company is the Claims Fiduciary with benefits under their Group Policy NO. M462-LTD-ASO.

Plaintiff contends that on January 8, 1991, Plaintiff became disabled and was paid benefits under the plan until July 23, 1993 at which time she became eligible for Long Term Disability benefits under the plan.

Plaintiff contends that Defendants have denied Plaintiff "Long Term Disability" benefits, and Plaintiff has complied

with all conditions and provisions, including appeals, and Defendants refuse to abide by the terms of the plan and group policy.

Plaintiff contends that pursuant to the Contract at issue herein, Plaintiff is entitled to One Thousand Five Hundred Thirty Six Dollars and Ninety Five Cents ($1,536.95) per month for ten (I 0) years for a total of One Hundred Eighty Four Thousand Four Hundred Thirty Four Dollars ($184,434.00).

Additionally, Plaintiff claims her attorney fees pursuant to statute.

WITNESS LIST

Comes now Plaintiff, by counsel and submits the following Witness List.

I. A representative of Hercules Incorporated.
2. A representative of Provident Accident Life Insurance Company, including Gail Willhoit.
3. Manuel A. Cacdac, M.D.
4. Petronio M. Ilagan, M.D.
5. P.L. Sankey, M.D.
6. Kurt Goehring.
7. Robert Taube, M.D.
8. Thomas H. Ramsey.
9. J. W. Bloxdorf, M.D.
10. R. M. Kohr, M.D.
II. R. Vedala, M.D.
12. Nancy Ord.
13. Keith L. Johnson as to attorney fee only.
14. Linda Ramsey.
15. All witnesses listed by Defendant.

EXHIBIT LIST

Comes now Plaintiff, by counsel and submits the following Exhibit List.

I Any and all medical records, including, but not limited to, those held by Terre Haute Regional Hospital, Dr. Manuel A. Cacdac, Dr. Petronio M. Ilagan, Dr. P.L. Sankey, Parke Clinic, Dr. Robert Taube, Dr. J.W. Bloxdorf, Dr. R. M. Kohr and Dr. R. Vedala.

2. Proof of Summary Plan Description for Hercules Incorporated.

3. All documents produced by Request for Production and disclosed through discovery.

4. All documents listed by Defendants.

5. Attorney fee Affidavit.

Keith L. Johnson, 321 Ohio Street, Post Office Box 654, Terre Haute, Indiana 47808, Telephone: (812)234-5056

s/illegible
Keith L. Johnson, Atty. No. 5010-84
Attorneys for Plaintiff

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been served on David W. Sullivan, COX, ZWERNER, GAMBILL & SULLIVAN, 511 Wabash Avenue, Post Office Box 1625, Terre Haute, Indiana, 47808-1625, by placing said copy in the United States Mail, first class postage prepaid, this I st day of July, 1994.

s/illegible
Keith L. Johnson

APPENDIX N

PROVIDENT
LIFE & ACCIDENT
INSURANCE COMPANY

1 FOUNTAIN SQUARE
CHATTANOOGA, TN 37402

March 31, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Sajid Syed
3805 Eunice Avenue
Wilmington, DE 19808

S. S. No. :	337-64-8157
Entity/Policy:	M462-LTD
Company:	Hercules Incorporated

Dear Mr. Syed:

During the elimination period, normally 6 months, and the first 24 months of benefit payments, you are considered totally disabled If you are not able to perform your job. You must not engage in any work for wage or profit during this time.

After receiving 24 monthly payments, you are considered totally disabled for as long as you are not able to engage in any employment for wage or profit for which you are reasonably qualified by training, education or experience.

As you are aware, an Independent Medical Examination was conducted by Raymond Joson, M.D. on March 10, 1994 in reference to your disability condition. A copy of this Independent Medical Examination was provided to you with our letter of March 22, 1994, per your request to Ms. Susan Hunter of our rehabilitation division.

According to the information received in the Independent Medical Examination, there was limitation of motion in the lumbar spine in flexion but you were able to flex almost horizontally, walk on heels and toes, without gross sensory loss noted. Dr. Joson's examination revealed good motion of your neck. Although there was slight decreased sensation in the right leg and some pain was felt in the hamstrings on extension of the legs and on straight leg raising, your reflexes were active and equal and you had good strength in your arms and legs.

Dr. Joson indicated his impression was that you have a chronic lumbar sprain type syndrome with lumbar spondylosis and would probably not be able to do the heavy work which you had done previously for Hercules Incorporated. However, Dr.. Joson did feel you are capable of doing sedentary to light type of work.

Address replies to: P.O. Box 12030, Chattanooga, Tennessee 37401 Toll Free Telephone: 1-800-633-7479

Mr. Syed, your Long Term Disability benefits began April 1, 1992 and the two year period of total disability from your occupation ceased on March 31, 1994.

Since the medical documentation does not support total disability from any occupation as defined above, Long Term Disability benefits ceased effective March 31, 1994 and the last check issued to you on March 28, 1994 reflected benefits from March 1 through March 31, 1994 and was the final Long Term Disability benefit payable under the terms of the LTD Plan.

In order to be of service to you, we have taken into consideration your work experience, 14 years of education and the medical information in your file and have been able to Identify several job titles which you may wish to consider when seeking future employment. These jobs include but are not limited to:

Larder Cook
Salad Maker
Food Services Supervisor
Cafeteria Manager -
Alarm Monitor (Security)
Appointment Clerk

This is an Employee Retirement Income Security Act of 1974 (ERISA) qualified plan under which you have certain rights, including the right of appeal.

If you disagree with our determination, you may submit a written request for reconsideration, accompanied by documents or records from your physician in support of your appeal. All of the information you wish to use for your appeal must be received in our office within 60 days after the date that you receive this letter. Any information received after 60 days will not be considered.

Sincerely,

s/illegible
Gayle Willhoit, ALHC, HIA
Disability Claim Specialist
Group Disability Claims
Disability Operations

co31

cc: Mr. Pat Donohue
Ms. Sue Browne

Mr. Pat Donohue
March 31, 1994
Page Three

Pat:

Thank you for discussing this claim with me by phone on March 29, 1994. As per our conversation, Long Term Disability benefits on Mr. Syed will be terminated effective March 31, 1994 as he no longer meets the definition of disability from any occupation as defined in this letter.

For your review, we are enclosing a copy of Dr. Joson's Independent Medical Examination and the Physical Capacities form. Should there be any questions, please let us know.

co31

APPENDIX O

RAYMOND M. JOSON, M.D. AND ASSOCIATES
MEDICAL OFFICE BUILDING
1501 LANSDOWNE AVENUE SUITE 308
DARBY, PENNSYLVANIA 19023

RAYMOND M. JOSON, M.D. F.A.C.S.
NEUROLOGICAL SURGERY
RIDDLE HEALTH CARE CENTER
HOURS BY APPOINTMENT ONLY

March 10, 1994

Elizabeth Tores-Lopez
Professional Appointment Services
P. 0. Box 371
Rutherford, New Jersey 07070-0371

Re: Sajed Syed

Dear Ms. Tores-Lopez ...

Sajed Syed was in my office on the 10th. day of March 1994 for an Independent Medical Examination. As you know, he was working outside on a machine on January 31, 1992, lost his balance and fell off the platform of the machine approximately 2 feet. landing on his back. He had pain in between his shoulder blades, he got up and stretched but had to rest the rest of the day. The pain gradually got worse that evening. It extended from his upper thoracic area to his low back region. He returned to work after the weekend and was put on light duty. He also was given physical therapy during this period of time. On March 4th. he was laid off but he was still doing light duty at the time. His cervical spine x-rays showed spurs on the left. There was some indentation or the C7 nerve root. There was some

slight anterior defects in the lumbar area. His pain has persisted to this time. Standing more than fifteen minutes he will feel a tightness in the back. He does sit up to six or eight hours during the day but intermittently. He is walking up to a couple of blocks and then he will feel tenderness in his back and will have to sit down or lay down. He will have pains at times from the knees to the feet. At times it feels like he is stepping on stones. He has some ache in both arms. His pain is more on the right side. His basic job is a chemical operator moving heavy drums of chemicals weighing up to 400 lbs. He uses a dolly. He will slip the drums onto the dolly and then have them placed on a wooden pallet 6 inches high.

His Examination today revealed good motion of his neck. There was limitation of motion in the lumbar spine in flexion. He flexed almost horizontally. He was able to walk on his heels and toes. There was no gross sensory loss noted; however, there was slight decreased sensation in the right leg. There was some pain felt in the hamstrings on extension of the legs and on straight leg raising. His reflexes were active and equal. He had good strength in his arms and his legs.

It is my impression that Sajed Syed has a chronic lumbar sprain type syndrome with lumbar spondylosis. In view of his symptoms persisting for over two years, I doubt that he would be able to do the heavy work which he had done before. His physical exam, however, does not correspond adequately with his subjective complaints. I do feel he is capable of doing sedentary to light type of work.

Sincerely,

s/illegible
RAYMOND M. JOSON, M.D.

APPENDIX P
(Selected Portions for Illustration Purpose)

SCH: 001 EIN: 510023450 DLN: 19037303344183

SCHEDULE A **Insurance Information** **1992**
(Form 5500)

Department of the Treasury
Internal Revenue Service

This Form is Open to Public Inspection

Department of Labor
Pension and Welfare Benefits Administration

Pension Benefit Guaranty Corporation

This schedule is required to be filed under section 104 of the Employee Retirement Income Security Act of 1974
File as an Attachment to Form 5500 or 5500-C/R
Insurance companies are required to provide this information as per ERISA section 103(a)(2)

Name of plan sponsor as shown on line 1a of Form 5500 or 5500-C/R **HERCULES INCORPORATED**

Employer identification number **510023450**

Name of plan **GROUP LONG TERM DISABILITY PLAN**

Name of insurance carrier **PROVIDENT LIFE & ACCIDENT INS COMPANY**

Contract or identification number **M-462-LTD**

Policy or contract year **From 07/01/91 To 06/30/92**

APPENDIX Q

18 Del. C. § 2702. "Policy" defined.

"Policy" means the written contract of or written agreement for or effecting insurance, by whatever name called, and includes all clauses, riders, endorsements and papers which are a part thereof.

(18 Del. C. 1953, § 2702; 56 Del. Laws, c. 380, § 1.)

18 Del. C. § 3315. Legal actions.

There shall be a provision as follows:

"Legal Actions: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished."

(18 Del. C. 1953, § 3315; 56 Del. Laws, c. 380, § 1.)